IN THE

Supreme Court of the United States

OCTOBER TERM, 1921

No. 138

JAMES J. RAFFERTY, Collector of Internal Revenue for the Philippine Islands, *Petitioner,*

vs.

SMITH, BELL & COMPANY, LIMITED, *Respondent.*

BRIEF FOR RESPONDENT

"Preliminary Observation"

This action was commenced and prosecuted against James J. Rafferty in his personal capacity—not against the Philippine Government nor against its Collector of Internal Revenue as such. Therefore, respondent has not agreed, and does not agree, to the substitution suggested by petitioner in the first paragraph of his brief.

Statement of the Case

To petitioner's statement respondent would add the fact, stated at page 9 of petitioner's brief, that the merchandise upon whose value the disputed taxes were assessed, was "sold and exported from the Philippine Islands." This is the allegation of the complaint, admitted by the answer. (Record, pp. 2-9, 12.)

It, therefore, was not an issue in the case when it was tried. It must be admitted here, as it has been in all proceedings heretofore had, that the merchandise upon which the taxes were assessed, was exported from the Philippines.

ARGUMENT

I

The Transactions Involved Were Exports

Petitioner argues that shipments from the Philippine Islands to the United States are not "exports from the Philippine Islands," within the meaning of sec. 11 of the Autonomy Act, which prohibits the levy and collection of duties on such exports. This contention, if sound, would lead to the amazing conclusion that Congress permitted the imposition of a burden on trade with the United States which was forbidden to be laid upon trade with foreign countries.

But, whatever may be the merit of the argument, it has no application to this case. Petitioner, briefing three cases together, has failed to make clear the difference, conceded at page 9 of his brief, which in this respect distinguishes this case from the others. It is alleged herein that the merchandise was "exported from the Philippine Islands," and the answer admits that this allegation is true. (Record, pp. 2-9, 12.)

The tax of sec. 1614 of Act 2657, in so far as it falls upon export sales, is an export duty.

The percentage tax on merchants' sales is called a "privilege tax on business or occupation" (Act 2657, sec. 1593), and it is urged that a tax imposed upon the privilege of selling merchandise, even in so far as it is measured by the gross price of export sales, is not a duty on exports. This argument has been discredited since *Brown* v. *Maryland*, 12 Wheat. 419. In that case it was decided that a statute requiring importers to pay a license tax for the privilege of selling their imports did, in effect, impose an import duty. By way of illustration Chief Justice Marshall says (p. 445):

> "Now, suppose the United States should require every exporter to take out a license, for which he should pay such tax as Congress might think proper to impose; would Government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the Constitution would expose it, by saying, that this was a tax on the person, not on the article, and that the legislature had a right to tax occupations?"

If a license tax of fixed amount, such as was condemned in *Brown* v. *Maryland*, on the occupation of an exporter is within the prohibition of duties on exports, even less defensible is a tax on such occupation which is directly proportioned to the volume of the business of exporting. In its effect upon the export business of respondent, the tax of sec. 1614 is exactly the same as if an export duty of 1% were frankly levied. Constitutional limitations may not be evaded by indirection, and the validity of a statute is to be determined by its effect, not by its form. *Cummings* v. *Missouri*, 4 Wall. 325; *Henderson* v. *Wickham*, 92 U. S. 259; *Fairbank* v. *United States*,

181 U. S. 283; *Bailey* v. *Alabama*, 219 U. S. 219.

A stamp tax on export bills of lading is an export duty. *Fairbank* v. *United States, supra.* But it would be merely tedious to cite further authorities and to argue the principle at length, for this court has recently passed upon the exact question in a case which, despite petitioner's opinion to the contrary, seems to us indistinguishable. *Crew Levick Co.* v. *Commonwealth*, 245 U. S. 360.

Attention is directed to an important feature of this point raised by petitioner, a feature that appertains to his immediately succeeding point. Neither was raised in the courts below; both are here urged for the first time. This Court holds that points available when the case was presented to the Philippine Supreme Court and not there urged, will not be considered upon review here. *De la Rama* v. *De la Rama*, 241 U. S. 154.

Neither of these points, therefore, is properly before this court, but as they can be very easily answered, respondent presents the plain arguments against them.

II

The taxes in question were not legalized by the Act of Congress of July 1, 1916.

The judgment under review affects taxes levied and collected under the ostensible authority of sec. 1614 of Act 2657; no others are involved in this case. Act 2657 was approved February 24, 1916, took effect July 1, 1916, and was superseded by Act 2711 October 1, 1917. The percentage tax on sales immediately before July 1, 1916, was found in Acts 2541 and 2622, which took effect January 1, 1916. By a provision inserted in an appropriation Act of July 1, 1916 (39 Stat. L. 286), Congress ratified the internal revenue taxes imposed by Acts 2541 and

2622. It is now contended that this ratification affords sanction for the taxes imposed by Act 2657.

The argument is best answered by quoting the ratification of 1916:

> "That the internal revenue taxes imposed by the Philippine Legislature under the law enacted by that body on December twenty-first, nineteen hundred and fifteen (No. 2541), as amended by the law enacted by that body on February 4, 1916 (No. 2622) * * * are hereby legalized and ratified, and the collection of all such taxes heretofore or hereafter is hereby legalized, ratified and confirmed as fully to all intents and purposes as if the same had by prior Act of Congress been specifically authorized and directed."

Bearing in mind that Act 2657, expressly repealing and superseding Acts 2541 and 2622, had been on the statute books for more than four months and took effect the very day that Congress acted, it requires hardihood to assert that Congress intended to include Act 2657 by specifying Acts 2541 and 2622. "When terms are unambiguous we may not speculate on probabilities of intention." *Insurance Co.* v. *Ritchie*, 5 Wall. 541, 545.

Even if the intention of Congress were open to inquiry, every apparent reason must impel the restrictive interpretation. This court in *Lincoln* v. *United States*, 197 U. S. 419 and 202 U. S. 484, and in *United States* v. *Heinszen & Co.*, 206 U. S. 370, had clearly marked the difference in effect between a specific and a general ratification. Congress had abolished Phillippine export duties by Act of October 3, 1913, (38 Stat. L. 193), and forbade that method of taxation in the Autonomy Act of Aug. 29, 1916. It may well be supposed that the ratification of July 1, 1916, (in so far as it affected export duties), was conceded only by way of exception to the general policy of Congress and only because the statutes validated by the ratification were already

superseded. To condone a temporary excess of authority in the past was one thing; to grant increased authority for future exercise was quite another.

Since 1902 Philippine import and export duties have been prescribed by Congress, and the invasion of this reserved function by various so-called internal revenue laws of the Philippine Legislature had led to a series of curative acts in which Congress has invariably employed the formula of specific ratification. 35 Stat. L. 615; 38 Stat. L. 1143; 39 Stat. L. 286; 40 Stat. L. 597; 41 Stat. L. 1025. As each Philippine statute took effect, whether we call it the re-enactment of an old law or the enactment of a new, it became the collector's authority to the exclusion of its predecessor, and Congress in every instance restricted its ratification to the taxes imposed "under" or "in" a specified act, and to the collection of "such taxes." If Congress by the Act of July 1, 1916, had authorized the re-enactment of provisions similar to those specifically ratified, why the superfluous ratifications of 1918 and 1920? And if in 1918 and 1920 Congress was actuated, not by an appreciation of necessity, but merely by a purpose to dispel doubts, why the consistent adherence to the formula of specific ratification?

The taxes in question were not legalized by the Act of Congress of June 4, 1918.

The taxes affected by the judgment herein were levied and collected under the ostensible authority of Act 2657, after the prohibition of export duties by sec. 11 of the Autonomy Act, and while that prohibition stood unimpaired. Act 2657 was superseded October 1, 1917, by Act. 2711, under whose ostensible authority similar taxes were thereafter levied and collected. By a provision of the appropriation act of June 4, 1918 (40 Stat. L. 597), Congress ratified the taxes imposed by Act 2711. Petitioner

argues that this ratification legalized the taxes imposed by Act *2657*.

Again the language of Congress affords the conclusive answer:

> "The taxes imposed by the Philippine Legislature in section fourteen hundred and fifty-nine of the act numbered twenty-seven hundred and eleven, enacted by that body on March tenth, nineteen hundred and seventeen, are hereby legalized and ratified, and the collection of all such taxes heretofore or hereafter is legalized, ratified and confirmed hereby as fully to all intents and purposes as if the same by prior Act of Congress specifically had been authorized and directed."

What has been said above of the ratification of 1916 is applicable to this Act of 1918. If possible, the reasons for the strict interpretation of the later enactment are more convincing. There is not only the presumption that Congress was advised of Act *2657*, but the research of petitioner (brief, p. *27*) shows that the situation was fully explained by the Governor-General, through the Secretary of War. Congress was advised that the Philippine Government had collected in defiance of Congress about $2,000,000 of export duties under Act *2657* and desired the sanction of Congress for the retention of such collections. The response in the form of a ratification limited to taxes "imposed in section 1459 of the act numbered 2711," is as clear a denial of the appeal of the Governor-General as could be framed. There is no repeal of sec. 11 of the Autonomy Act, and the evident purpose is to grant a limited exception rather than to abandon the principle of the prohibition of export duties. Congress may have been disposed to grant relief from the time when the Philippine Government, by the Governor-General's letter, evidenced a law-abiding sentiment; this must have been, as

petitioner shows, about October 1, 1917, which was moreover a convenient starting-point. But Congress must have been reluctant to stultify wholly the prohibition of export duties of the Autonomy Act, and wholly to condone the impudent disregard of the effect of that prohibition upon sec. 1614 of Act 2657.

III

The recital in the judgment under review, that sec. 1459 of Act 2711 repealed sec. 1614 of Act 2657, if error at all, is immaterial.

Justice Johnson was inaccurate in saying that sec. 1614 of Act 2657 was *expressly* repealed, but the context (quoted only in part by petitioner) shows that the Justice fully understood, and adequately stated, the relation of the two statutes. The verbal mistake has no influence or effect upon the conclusions stated.

Act 2711 purports to be an amendment of Act 2657 and contains no explicit repeal of the latter. It provides that "said Act (2657) shall hereafter read as follows," and continues to the length of twelve hundred printed pages. To say that Act 2711 supersedes, without repealing, Act 2657, is merely to quibble.

Whatever the effect for other purposes of the form employed in revising the administrative law, we have the fact that the Collector's ostensible authority for the collection of the taxes herein involved was Act 2657, and that the Act of Congress of June 4, 1918, ratified only Act 2711.

IV

The Act of Congress of June 5, 1920, can not have the effect of confiscating the judgment under review.

This action was commenced in the Court of First Instance of Manila in February, 1918, (Record, p. 1). In July, 1918, that Court ordered the entry of judgment, (Record, pp. 12-17). Both parties appealed. The Philippine Supreme Court entered its judgment in March, 1920, (Record, pp. 48-50). By this judgment respondent became entitled to recover from petitioner the amounts which petitioner had exacted as taxes under the ostensible authority of section 1614 of Act 2657. June 5, 1920, Congress in an appropriation act (41 Stat. L. 1025) provided:

> "The taxes imposed by the Philippine Legislature in section 1614 of the Act numbered 2657, enacted by that body on February 24, 1916, are legalized and ratified, and the collection of all such taxes made under or by authority of such Act of the Philippine Legislature is legalised, ratified, and confirmed as fully to all intents and purposes as if the same had by prior Act of Congress been specifically authorized and directed."

Petitioner contends that this enactment is effective, not only to validate the collection of such taxes as were paid without protest, not only to defeat pending actions for the recovery of taxes exacted without prior authority —but also to reverse, annul, or confiscate, the judgment herein reviewed.

For the purpose of argument under this head it must be assumed that the ratification intends the effect attributed to it by petitioner: To operate retrospectively; to supply for the period of the controverted collections the authority which at the time was not only withheld from, but specifically denied to, the Philippine government and its officials; to apply, not only to collections undisputed or still in controversy, but to obligations merged in judgment; concretely, to relieve and dis-

charge James J. Rafferty from his judgment debt to respondent. Later it will be argued that the ratification may not be so construed; but the present question is whether Congress had power to accomplish what petitioner claims—whether the Act, with petitioner's construction, is valid.

It is significant that the diligence of petitioner's counsel has produced no reported case wherein a curative statute has been held effective to divest a right reduced to judgment. (Note the admission of failure at p. 46 of brief). The decisions upholding retrospective statutes to cure irregularities as against claims not reduced to judgment, of which many are quoted or cited by petitioner, do not require particular notice. All are distinguishable in that they do not involve the overthrow of judgments, and most of them present other obvious and vital differences that make them inapplicable herein. None of them goes so far toward being in point as *United States* v. *Heinszen & Co.*, 206 U. S. 370, and if, as respondent will endeavor to show, that case is not controlling, all the others fall with it.

The proposition that a statute may divest rights established by a judgment is so abhorrent to our fundamental principles and to natural justice, as well as to familiar constitutional limitations, that there are few instances in our jurisprudence where the attempt has been made and passed upon. Nevertheless, there is plain condemnation of the theory in the decisions of this Court.

> "It is not within the power of a legislature to take away rights which have been once vested by a judgment." *McCullough* v. *Virginia*, 172 U. S. 102, 123.
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> "It is undoubtedly true that legislatures cannot set aside the judgments of courts." *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 478.

"But it is urged, that the Act of Congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby in favor of the plaintiff. This, as a general proposition, is certainly not to be denied, especially as it respects adjudication upon the private rights of parties. When they have passed into judgment the right becomes absolute and it is the duty of the court to enforce it. * * * Now, we agree, if the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the power of Congress." *Pennsylvania* v. *Wheeling & B. B. Co.*, 18 How. 421, 431.

In the State courts there is an unbroken line of authorities denying the power of the legislature to vacate judgments, to grant new trials, or in the form of curative statutes to divest judgment rights. In these cases the condemnation of the statute is generally based upon legislative invasion of judicial power, but in all it might equally have been said that the statutory assault upon vested rights was not due process of law, and in some of the decisions this is recognized.

Haley v. *City*, 68 Penn. St. 45
Taylor v. *Place*, 4 R. I. 337
Sanders v. *Cabaniss*, 43 Ala. 184
Lawson v. *Jeffries*, 47 Miss., 702
Griffin v. *Cunningham*, 20 Gratt. 54

While *United States* v. *Heinszen & Co.*, *supra*, holds that a Congressional ratification may destroy a mere right of action, practically overruling in this respect *De Lima* v. *Bidwell*, 182 U. S. 1, yet the reasoning, by distinction, compels the conclusion that a claim reduced to judgment is immune. In the quotation the italics are supplied.

"Nor does the mere fact that, at the time the ratify-

ing statute was enacted, this action *was pending* for the recovery of the sums paid, cause the statute to be repugnant to the Constitution. The mere commencement of the suit did not change the nature of the right. * * *

"Considering how far the bringing of actions would operate to deprive government of the power to enact curative statutes which, if the actions had not been brought, would have been unquestionably valid, Cooley, in his Constitutional Limitations, says (7th ed. p. 543):

"'Nor is it important, in any of the cases to which we have referred, that the legislative act which cures the irregularity, defect, or want of original authority, was passed after suit brought, in which such irregularity or defect became matter of importance. The bringing of suit vests in a party no right to a particular decision (cases cited); and his case must be determined on the law as it stands, not when the suit was brought, but *when the judgment is rendered.* (Cases cited.)'" (p. 387.)

The judgment herein is final, to the extent of creating a property right that cannot be divested by subsequent legislation.

It is immaterial that the judgment may not be immediately executed because of the granting of a writ of certiorari herein. The immunity of respondent's judgment from legislative confiscation does not depend upon its finality in the sense of not being subject to judicial review. If the interposition of this court had the effect of vacating the judgment and bringing the cause here to be tried *de novo*, the case might, arguably, be different; but upon the allowance of the writ, the judgment is reviewed "as if brought up by writ of error," and it is precarious only to the extent that error may be found. If the judgment is declared free from error, its affirmance by this court will in no way enhance its value or change its character. The ultimate question is

whether the judgment is "property" of respondent, such as may not be taken without due process; the review herein is an examination of respondent's title to the property—not a proceeding from which such title may arise. A judgment creditor in a case reviewable for error may be divested of his property in the judgment, but only by "due process of law"—which judicial reversal is, and legislative confiscation is not.

Heinszen Case further distinguished.

There is a fundamental difference between the ratification sustained in *United States* v. *Heinszen & Co., supra,* and the ratification asserted by petitioner herein, in that the one supplied a mere *absence* of prior authority, while the other is invoked to cure an express *denial* of authority. This difference is inferentially recognized in the *Heinszen* opinion, where the court says (p. 382):

> "Where an agent, *without* precedent authority, has exercised in the name of the principal a power which the principal *had the capacity to bestow*, the principal may ratify and affirm the unauthorized act, and thus retroactively give it validity when rights of third parties *have not intervened*, is so elementary as to need but statement." (Italics supplied.)

It is equally obvious that where the principal has denied authority to his agent and third parties have relied upon such denial, the principal may not thereafter retroactively give validity, in prejudice of such third parties, to acts of the agent in contumacious exercise of the power denied.

The principles involved are those of agency, as the *Heinszen* decision makes clear, and the distinction may be made plain by a simple illustration. If my pretended agent, without precedent authority, collects rents from an

occupant of my house, I may ratify such collection; but if I have agreed with my tenant that his rent shall be $100 per month, and my agent compels him to pay under duress and protest $150 per month, no ratification on my part would validate the extortion. So, when Congress enacted "that no export duties shall be levied or collected on exports from the Philippine Islands," it deprived itself for so long as the prohibition stood unrepealed of "the capacity to bestow" power to collect such duties. The prohibition was revocable at the will of Congress, but so long as it remained in force as a restriction on the Philippine Government and its tax-collectors, third parties enjoyed the right of exemption from export duties, terminable, but not subject to be retroactively divested.

Mr. Justice Harlan, concurring in the majority opinion in the *Heinszen* case, says (p. 391):

> "Interpreted in the light of previous and pending litigation, this act should be construed as denying the authority of any court to take cognizance of a suit brought against the United States to recover any claim arising out of such collections. The act should, therefore, be construed as withdrawing the consent of the United States to be sued on account of claims of that character. In this view, it was error to render judgment against the United States, whatever might be the liability of the Collector, if his exaction of the duties in question was without authority of law. Upon this ground alone and without considering any of the questions discussed in the opinion of the court, I concur in the judgment of reversal."

In that case the suit was against the United States. In this case the suit is against James J. Rafferty, an individual. It involves only "the liability of the Collector." Mr. Justice Harlan's principle therefore cannot be urged in support of the alleged ratification in this case. The dis-

tinction is clear between an Act of Congress withdrawing the government's consent to be sued, and an Act which pretends to relieve one individual from his judgment debt to another.

Respondent's vested right in his judgment analagous to vested rights secured by exemption from taxation.

There is no more familiar example of vested rights immune from a taking without due process than exemption from taxation. Such exemption is commonly in perpetuity or for a fixed period, but it might imaginably be granted without term. Can it be doubted that an attempt to take away such exemption retrospectively would be invalid? Whether such an exemption is definite or precarious, it is property and has been held by this Court to be protected by the Constitution against Congressional action. In the case of *Choate v. Trapp*, 224 U. S. 665, it appears that Congress by the Curtis Act of 1898, amended in 1902, provided for the allotment of tribal lands of Indians and for exemption of the individual holdings from taxation. In 1908 an Act of Congress pretended to authorize taxation of the same lands. The State of Oklahoma attempted to impose taxes and the Indians resisted. This Court, by Mr. Justice Lamar, says (p. 673):

> "The patent issued in pursuance of those statutes gave the Indian as good a title to the exemption as it did to the land itself. Under the provisions of the 5th Amendment there was no more power to deprive him of the exemption than of any other right in the property."

To the same effect is the very recent case of *Ward* v. *Love County*, 253 U. S. 17. Would not the result have been the same if the exemption from taxation had been indefinite and revocable, and Congress had attempted to

ratify taxes imposed by the State before the repeal of the exemption?

Even in the Philippine Islands no person may "be deprived of life, liberty or property without due process of law."

From a misunderstanding of the "Insular Cases" and certain subsequent decisions of this Court there has arisen a wide-spread belief that Congress has power unlimited to legislate for the Insular Possessions; that none of the safeguards and limitations of the Constitution of the United States protect lives, liberties and property in the Possessions against Congressional action. This belief has no foundation in the decisions of this Court, and none in principle.

If there is no decision of this Court affirmatively applying any guaranty or limitation of the Constitution in the Philippine Islands or Porto Rico, the reason is plain; the occasion has not arisen. No case has been presented in this court wherein Congress legislating for the Possessions, has attempted to pass a Bill of Attainder, to grant a Title of Nobility, to prohibit the free exercise of religion, nor, without due process of law, to deprive any person of life, liberty or property.

In cases wherein insular legislatures have encroached upon personal rights, the decisions have been based upon the guaranties of Congressional organic laws, and the Court has avoided as unnecessary determining whether the corresponding provisions of the Constitution would have been applicable. Thus in *Kepner* v. *United States,* 195 U. S. 100, Justice Day says (p. 124): "It is not necessary to determine in this case whether the jeopardy provision in the Bill of Rights would have become part of the law of the Islands without Congressional legislation."

On the other hand, the power of Congress over the

Insular Possessions is derived from the same provision of the Constitution—Art. IV, Sec. 3, par. 2—which supported the jurisdiction of Congress in the Territories which later became States. And it has been held, as we shall see, that in legislating for those Territories Congress was not wholly exempt from constitutional limitations.

It has been held that the Uniformity Clause of Art. 1, Sec. 8, does not apply to duties imposed by Congress in the Possessions, because the section requires uniformity only "throughout the United States," and the Possessions are not a part of the United States. *Downes* v. *Bidwell*, 182 U. S. 224. But in that case even the majority of the Court conceded that the Constitution contains limitations which operate upon the power of Congress wherever exercised; and it is apparent that the decision would have gone the other way if the requirement of uniformity had been stated in the Constitution without the qualifying phrase.

It has been held, also, that the right to trial by jury conferred by the sixth amendment does not extend to the Territories and Possessions. *Hawaii* v. *Mankichi*, 190 U. S. 197; *Dorr* v. *United States*, 195 U. S. 138. But in the Mankichi case Justice Brown says for the Court (p. 217): "We would even go farther, and say that most, if not all, the privileges and immunities contained in the Bill of Rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case (indictment by grand jury and trial by jury) are not fundamental in their nature but concern merely a method of procedure * * *." And Justices White and McKenna, concurring, point out that Hawaiian laws must yield, "Where they were inconsistent with those fundamental provisions of the Constitu-

tion which were, by their own force, applicable to the territory with which Congress was dealing."

In the Dorr case, Justice Day says:

> "The exercise of the power expressly granted to govern the territories is not without limitations. Speaking of this power, Mr. Justice Curtis, in the case of *Scott* v. *Sandford*, 19 How. 614, 15 L. ed. 787, said:
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> " 'If, then, this clause does contain a power to legislate respecting the territory, what are the limits of that power?
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> " 'To this I answer that, in common with all the other legislative powers of Congress, it finds limits in the express prohibitions on Congress not to do certain things; that in the exercise of the legislative power, Congress cannot pass an *ex post facto* law or bill of attainder; and so in respect to each of the other prohibitions contained in the Constitution.' " (p. 142).
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> "The limitations of this power were suggested by Mr. Justice Curtis in the *Scott Case*, above quoted, and Mr. Justice Bradley in the *Church of Jesus Christ of L. D. S.* v. *United States*, 136 U. S. 1, 34 L. ed. 481, 10 Sup. Ct. Rep. 792, said:
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> " 'Doubtless Congress, in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions.' " (p. 146.)

In *Downes v. Bidwell*, 182 U. S. 262, Justice Brown says, for the majority of the Court:

> "To sustain the judgment in the case under consideration, it by no means becomes necessary to show that none of the articles of the Constitution apply to the island of Porto Rico. There is a clear distinction

between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only 'throughout the United States' or among the several States.

"Thus, when the Constitution declares that 'no bill of attainder or *ex post facto* law shall be passed,' and that 'no title of nobility shall be granted by the United States,' it goes to the competency of Congress to pass a bill *of that description.* Perhaps the same remark may apply to the 1st Amendment, that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peacefully assemble and to petition the government for a redress of grievances.' We do not wish, however, to be understood as expressing an opinion how far the bill of rights contained in the first eight amendments is of general and how far of local application." (p. 276.)

* * * * * * *

"We suggest, without intending to decide, that there may be a distinction between certain natural rights enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinions and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law, and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government. * * *" (p. 282.)

In the same case Mr. Justice White, for himself, and for Mr. Justice Shiras and Mr. Justice McKenna, concurring says:

"While, therefore, there is no express or implied limitation on Congress in exercising its power to create local governments for any and all of the territories, by which that body is restrained from the widest latitude of discretion, it does not follow that there may not be inherent, although unexpressed, principles which are the basis of all free government which cannot be with impunity transcended" (p. 290).

* * * * * * *

"Undoubtedly there are general prohibitions in the Constitution in favor of the liberty and property of the citizen, which are not mere regulations as to the form and manner in which a conceded power may be exercised, but which are an absolute denial of all authority under any circumstances or conditions to do particular acts." (p. 294).

The grounds of dissent in the Insular cases show that *all* of the Justices were agreed that the "general prohibitions" in support of "natural rights" limited the power of Congress to legislate for the Possessions.

Among these effective limitations is certainly that of the 5th Amendment:

"No person shall * * * be deprived of life, liberty, or property, without due process of law."

In *Fletcher* v. *Peck*, 6 Cranch 87, the State of Georgia had authorized by statute the sale of state lands. After conveyances had been made by virtue of this statute the State Legislature by another statute undertook to annul and rescind the first law and to avoid the titles acquired by its authority. The case involved the prohibition of Art. I, sec. 10, whereby the States are forbidden to impair the obligation of contracts. But the opinion of Chief Justice Marshall is of especial interest for our present inquiry.

"Is the power of the legislature competent to the annihilation of such title, and to a resumption of the property thus held? (p. 135).

"The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature.

"The correctness of this principle, so far as respects general legislation, can never be controverted. But, if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power * * *

"It may well be doubted whether the nature of society and of government does not prescribe some limits to this legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?

"To the legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection.

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"The validity of this rescinding act, then, might well be doubted were Georgia a single sovereign power * * * (p. 136).

* * * * * * * * * *

"The state legislatures can pass no *ex post facto* law. An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared, by some previous law, to render him liable to that punishment. Why, then, should violence be done to the natural mean-

ing of words for the purpose of leaving to the legislature the power of seizing, for public use, the estate of an individual in the form of a law annulling the title by which he holds that estate? The Court can perceive no sufficient grounds for making this distinction. * * * " (p. 138).

In the same case Mr. Justice Johnson, concurring, denies the application of Act I, Sec. 10, and puts his assent squarely on the ground of general principles:

> "I do not hesitate to declare that a state does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things; a principle which will impose laws even on the Deity." (p. 143).

Authorities might be multiplied, but there will hardly be dissent from the principle. The confiscation of private property by legislation, "without due process of law," is so abhorrent to the whole spirit of the Constitution, that if, as the *Insular Cases* so strongly suggest, there are limitations which Congress may not disregard in legislating for the territories, the "due process clause" is one of them. Indeed, it is so specified by Justice Brown in Downes v. Bidwell, *supra*—"The right to * * * individual property * * * to due process of law."

V

The ratification by Act of June 5, 1920, covers only the period between July 1 and Aug. 29, 1916.

It will be convenient here to review the pertinent facts and dates. Act 2657 was approved in February, 1916, and took effect July 1, 1916. Up to that time, and until August of the same year, the Philippine government lacked power to impose export duties, but there was no express denial of such power. Nevertheless, Sec. 1614 of Act 2657 purported to apply the 1% merchants' tax to export sales and con-

signments. The Autonomy Act was approved by Congress August 29, 1916, and in sec. 11 provided, "That no export duties shall be levied or collected on exports from the Philippine Islands," thus repealing *pro tanto* Act 2657, for, as Chief Justice Marshall says in *M'Culloch* v. *Maryland*, 4 Wheat. 316, 425:

> "A law, absolutely repugnant to another as entirely repeals that other as if express terms of repeal were used."

The amounts covered by the judgment herein were levied and collected after August 29, 1916, and under the ostensible authority of the repealed provisions of Act 2657. In 1920 Congress enacted the ratification, which, for convenient reference is here again quoted:

> "The taxes imposed by the Philippine Legislature in section 1614 of the Act numbered 2657, enacted by that body on February 24, 1916, are legalized and ratified, and the collection of all such taxes made under or by authority of such Act of the Philippine Legislature, is legalized, and ratified, and confirmed as fully to all intents and purposes as if the same had by prior Act of Congress been specifically authorized and directed."

Does this provision repeal the prohibition of sec. 11 of the Autonomy Act in so far as the latter affected sec. 1614 of Act 2657? Not expressly. But does it work such repeal by implication, as being a later statute "absolutely repugnant to" the earlier? Such a result is to be avoided if possible; if more than one construction is applicable, that must be preferred which will enable the two statutes to stand together.

> "Repeals by implication are not favored. This means that it is the duty of the Court to so construe the acts, if possible, that both shall be operative." Lewis' Sutherland, Statutory Construction, sec. 247.

> "The intention to repeal * * * will not be presumed, nor the effect of repeal admitted, unless the inconsistency is unavoidable, and only to the extent of the repugnance." id., id.
>
> 25 R. C. L. 918, secs. 169, 170.

We are considering a ratification. *In United States* v. *Heinszen*, 206 U. S. 380, at page 384, Mr. Justice White adopts the statement from *Mattingly* v. *District*, 97 U. S. 687, 690:

> "The ratification, if made, was equivalent to an original authority, according to the maxim, *Omnis ratihabitio retrotrahitur et mandato priori aequiparatur.*"

And Congress in the statute itself defines the effect to be given to its action: "As fully to all intents and purposes as if the same had, by prior Act of Congress, been specifically authorized and directed." Surely it can not be thought that ratification is *more* effective than prior authorization.

Let us apply the test prescribed by Congress. Suppose that there had been in force in February, 1916, an Act of Congress which "specifically authorized and directed" the enactment of sec. 1614 of Act 2657. Then the export duties imposed by that section would have been perfectly valid until August 29, 1916, when Congress directed that they should no longer be levied or collected; after that date they would have been invalid. Such is the exact effect of the ratification; it supplies the original authority, which theretofore was lacking for sec. 1614 of Act 2657 in its application to exports, for so long as that section was effective; but it does not prolong the life of the section nor validate collections which, being made after August 29, 1916, were not "under or by authority of" the provisions then repealed.

It may be unusual, but it is by no means impossible, nor is it unprecedented, to ratify for the term of its existence a statute which has been repealed. Congress by Act of July 1, 1916, ratified Acts 2541 and 2622, which had died by repeal the day before. (See II, *supra*.) The situation would be exactly the same if the repeal and ratification had been synchronous; if the ratification of 1920 had been incorporated in the Autonomy Act together with the prohibition of export duties, the two provisions would have fitted together perfectly, the one operating retrospectively and the other prospectively.

Petitioner's sole argument against the interpretation which respondent puts upon the ratification of 1920 is that the statute provides for the legalization of the collection of *"all* such taxes." (Brief, p. 59.) Counsel's italics are not carried far enough—Congress legalized the collection of "all *such* taxes (i. e., those imposed by section 1614 of Act 2657) made *under* or *by authority of such Act"* and only *"as* fully—as if the same had by prior Act of Congress been specifically authorized and directed." The amounts which James J. Rafferty has been ordered to repay to respondent are not "taxes imposed * * * in section 1614 of the Act numbered 2657", nor were they collected "under or by authority of such Act," because that section, in so far as it imposed export duties, had been repealed or annulled by the sovereign power of Congress and no longer afforded authority for the collection of export duties. Whatever authority Mr. Rafferty may have pretended for the controverted exactions, in reality he had none.

In this respect an interesting analogy is afforded by another ratification act, as construed in *Lincoln* v. *United States*, 202, U. S. 484. In that case the disputed collections, import duties, had been collected, under the osten-

sible authority of an order of the President, after the ratification of the Treaty of Paris. The Court held that the President's powers, without Congressional support, ceased with the war. Congress, by sec. 2 of the Act of July 1, 1902, ratified "the actions of the authorities of the Government of the Philippine Islands taken in accordance with the provisions of said order." It was held that the President's order, having no authority except the war power, was limited to the duration of the war as clearly as if so expressed; that import duties collected after the ratification of the treaty were, therefore, not "in accordance with the provisions of said order"; that, while Congress might have ratified such collections (as was subsequently done), the terms of the statute under consideration only affected collections made during the life of the President's order.

> "The statute does not ratify all actions or all collections of taxes, as it easily might have done, but only actions in accordance with the order." (p. 498.)

So, in this case, the authority ratified is that of sec. 1614 of Act 2657, which, in respect to export duties, ceased on August 29, 1916, by virtue of sec. 11 of the Autonomy Act; and the ratification by its terms is limited to actions "under or by authority of" the section specified. Congress might easily have said that the ratification was of *all* collections of export duties, but chose to restrict the validation to such as were made by authority of section 1614.

Here, as in the *Lincoln* case, "Every consideration requires that the ambiguous language of the act should not be stretched beyond the exact and literal meaning of the words" (p. 499). Here, as there, the ratification has a proper and useful application in its restricted interpretation; here, as there, there were pending actions which Congress may not be presumed to have intended to destroy

in the absence of clear expression of such intention—a principle of greater force herein because the actions were not merely pending, but reduced to judgment. In *United States* v. *Heinszen & Co., supra,* the court, citing the Lincoln case, says (206 U. S. at p. 390):

> "In the course of the opinion, in answering the argument that the alleged ratifying statute would be meaningless unless it were held applicable to the particular duties in controversy, it was pointed out (202 U. S. p. 499) that there were duties levied and collected other than those in controversy, to which the act clearly applied, and 'that question (as to them) was put at rest by this ratification.' Further in calling attention to the ambiguity in the ratifying statute relied upon and the resulting doubt whether it embraced all duties, it was pointed out that the fact that actions were pending at the time of the ratifying act lent cogency to the view that, if Congress had intended by the ratification to affect them, it would have explicitly so declared. On this subject the Court said (p. 498):
>
> "'This construction is favored by the consideration that the suits had been begun when the Act of July 1, 1902, was passed, and that, even if Congress could deprive plaintiffs of their vested rights in process of being asserted (Hamilton v. Dillin, 2 Wall. 73), still it is not to be presumed to do so on language which, literally taken, has a narrower sense.'"

The conclusion that Congress intended the more restricted effect of the ratification of 1920 is further impelled by the known circumstances. In 1918 Congress was urged by the Philippine Government to ratify Act 2657 as well as Act 2711, and refused (petitioner's brief, p. 27; *supra*, p. 7). In 1920 the plea for ratification must have embraced the period involved in this cause (and in other cases still pending in the Philippine Courts). This court had pointed out the restricted scope of the ratifi-

cation in the *Lincoln* case, and had added emphasis by giving broader effect to the ratification in the *Heinszen* case. When, with all this information and advice, Congress chose to employ the formula construed in the *Lincoln* case, failed to declare explicitly its purpose to affect pending actions or judgments, refrained from ratifying *all* collections—there can be only one inference. Congress intended to sanction only the export duties collected *without* authority and before the Autonomy Act—not such duties collected in *defiance* of the prohibition while the latter stood unimpaired.

It has been argued (IV *supra*), that the construction given the ratification of 1920 by petitioner would violate the guaranty of due process of law. If that contention is sound, there arises a strong presumption in favor of such a construction as will avoid the result of unconstitutionality. (Lewis' Sutherland, Statutory Construction, sec. 83; 1 Fed. Stats. Ann., p. 107; *St. Louis* v. *Arkansas*, 235 U. S. 350.) But if both constructions are possible, and both constitutional, that one must be preferred which is consonant with fairness and natural justice. Retrospective taxation, particularly on gross income, has necessarily an element of unfairness. But in this case there is more than that—sec. 11 of the Autonomy Act afforded to Philippine exporters a guaranty upon which, so long as it stood unrepealed, they were perfectly entitled to rely in making their prices and their contracts. It would have been indecent for them even to suspect that Congress would stultify its declaration and retrospectively sanction the impudent disregard by Philippine officials of the Congressional prohibition. To ratify in 1920 taxes on gross income of 1916-1917, which had been expressly prohibited during that period, would be outrageous.

"The supposition that the government will not pay its debts or will not do justice is not to be indulged." *Gibbons* v. *United States*, 8 Wall. 269, 274.

VI

If Petitioner's collection of the taxes was unlawful, the award of interest was not error.

If petitioner unlawfully exacted the payments covered by the judgment under review, then his subsequent retention of the money was equally unlawful. The remedy for the initial wrong is repayment of the principal; the remedy for the subsequent and continuing wrong is the payment of interest.

The Philippine law forbids the courts to enjoin the collection of disputed taxes. Act 2711, sec. 1578; Act 2657, sec. 1720. The only redress of an aggrieved taxpayer is by payment under protest, and, upon denial of administrative relief, recovery by suit. *Churchill* v. *Rafferty*, 32 Phil. 593. If Philippine statutes are construed to limit such recovery to the principal, to deny compensation for loss of use of money unlawfully taken, they must be held invalid for violation of the provisions of the Autonomy Act, Act of Congress of August 29, 1916.

If the Philippine government might not impose export duties, neither might it require of exporters involuntary and uncompensated loans. If the Philippine government had no power to collect as taxes the sums involved herein, may retain them for years and be discharged of all obligations by repayment without interest, then private property will have been taken for public use without just compensation; for the use of money is property as well as the money itself.

The Philippine Legislature could not relieve the petitioner of his personal obligation to make good the

damage resulting from his unauthorized acts. A statute may properly provide that interest shall not be recoverable on voluntary loans in the absence of stipulation to the contrary; but it is quite another thing to deny compensation for the loss of use of money taken unlawfully and under duress. If petitioner may discharge his obligation by mere repayment of principal, then the law so providing deprives respondent of the use of its money—which is property—without due process of law.

Section 1579 of Act 2711, invoked by petitioner, authorizes an action against the Collector of Internal Revenue, after the performance of certain conditions, to recover "without interest" sums unduly exacted as internal revenue taxes. Given prospective application, and limited to the special remedy which it affords, the section with its limitation may be justified If, however, it is so construed as to govern an action to enforce the personal obligations of the petitioner, or to apply to an action to recover sums exacted under the authority of a former law, superseded by Act 2711, which authorized recovery with interest, section 1579 contravenes the Autonomy Act. The Philippine Supreme Court has held that section 1579 is inapplicable herein, and the presumption is strong in favor of such a construction to avoid the result of unconstitutionality. Lewis Sutherland, Statutory Construction, sec. 83, 1 Federal Statutes Annotated, p. 107; *St. Louis* v. *Arkansas*, 235 U. S. 350.

In favor of the construction adopted by the Court below, as against the theory of petitioner which would deny compensation for the unlawful retention of respondent's funds, is the rule that the legislature is presumed not to have intended to work hardship or injustice. Lewis' Sutherland, op. cit., secs. 488, 490; 1 Fed. Stats. Ann., p. 101; *Lionberger* v. *Rouse*, 9 Wall., 475.

The question turns on local law.

The award of interest by the Philippine Supreme Court is based entirely upon the construction and application of Philippine law. The general rule in the Islands is set out in Art. 1108 of the Civil Code, cited by the Court below (Record, p. 32):

> "Should the obligation consist in the payment of a sum of money, if the debtor should become in default, the indemnity for damages, in the absence of a stipulation to the contrary, shall consist in the payment of the interest agreed upon, or, should there be no agreement, in the payment of interest at the legal rate.
>
> "Until another rate is fixed by the government, the legal rate of interest shall be six per cent per annum."

That this provision applies to the obligation to repay arising from unlawful exactions of tax collectors, has been determined by the Supreme Court of the Philippine Islands, not only in the instant case, but in other decisions. *H. E. Heacock Co.* v. *Insular Collector*, 37 Phil., 970; *Hongkong & Shanghai Banking Corporation* v. *Rafferty*, 39 Phil., 145; *Palanca* v. *City*, XVIII Official Gazette, No. 89, p. 2725.

While there was a dissent in the court below as to the adjudication of costs, the Justices were unanimous in awarding interest, and this circumstance strengthens the presumption which attaches to a determination of Philippine law by the highest court of the Islands.

> "We follow and sustain the local law as applied by the court below unless we are constrained to the contrary by a sense of clear error committed." *Villanueva* v. *Villanueva*, 230 U. S., 293, 299.

This is not an action against the Government.

In the case of a disputed internal-revenue tax of the United States the protestant taxpayer may sue the United States by authority of the Tucker Act, or he may sue the collector personally. If he elects the former remedy, he takes it with the limitations which are imposed upon the waiver of the sovereign's immunity; but if he chooses to sue the collector, the indirect interest of the United States and even the statutory assurance that the Treasury will respond for the judgment do not preclude a full recovery with interest and costs.

> "The distinction appears to be between suits to recover moneys illegally exacted as taxes and paid under protest, brought against collectors, although the judgment is not to be paid by the collector, but directly from the Treasury, and suits against the United States." *Viuda* v. *Rafferty*, 37 Phil. 957, 965.

And so it is in the Philippine Islands: the aggrieved taxpayer has a special action, substantially against the government, under the authority of Sec. 1579 of Act. 2711, or the corresponding section of preceding codes; and he has his action against the collector personally upon the quasi-contractual obligation arising from the receipt of what is not due, defined in Arts. 1895—1901 of the Civil Code.

The defendant herein is James J. Rafferty. It is true that Mr. Rafferty was the Collector of Internal Revenue during the period of the controverted collections; his office enabled him to coerce the payments. It is true, also, that when the complaint was filed Sec. 1579 of Act 2711 authorized an action against the Collector of Internal Revenue for the recovery "without interest" of the sums alleged to have been illegally collected. But it does not follow that this action is governed by said section 1579.

"Collector of Internal Revenue" is the title of the chief

of the Bureau of Internal Revenue (Act 2711, Sec. 1421). Internal Revenue taxes may be collected by deputies and subordinates (id., sec. 1426), or by the "Collector of Internal Revenue" himself, for example in his *ex-officio* capacity of City Assessor and Collector of Manila (id., sec. 1422). In the absence of statutory authority an aggrieved taxpayer might not sue the Philippine government nor any of its agents in his official capacity, but must rely entirely upon the personal responsibility of the officer who had exacted the payment unduly. But since 1914, at least, the internal-revenue law has authorized an action against the "Collector of Internal Revenue," "the process to be served upon him, upon the provincial treasurer, or upon the officer collecting the tax" (Act 2711, sec 1579; Act 2657, sec. 1721; Act 2339, sec. 140). For this action it does not matter whether the protested payment had been made to the chief of the bureau or to a subordinate; the liability imposed upon the defendant is derived from the statute alone and depends upon the official position of the defendant; the remedy is conditioned upon the previous performance of specified conditions and, in cases governed by Act 2711, is limited to recovery of the principal.

But the establishment of this special remedy has not precluded the taxpayer's right to sue personally the officer who exacted the undue payment, whether the chief of the bureau or another. As in the United States R. S. sec. 989 recognizes the personal liability of collectors and provides for their protection against personal judgments, so sec. 1583 of Act 2711 makes similar provision for the case of personal judgments recovered against Philippine collectors.

> "Sec. 1583. Satisfaction of judgment recovered against treasurer or other officer.—When an action is brought against any revenue officer to recover damages by reason of any act done in the performance of

official duty, and the Collector of Internal Revenue is notified of such action in time to make defense against same, through the Attorney-General, any judgment, damages or costs recovered in such action shall be satisfied by thé Collector of Internal Revenue upon approval of the Department head, or if the sum be paid by the person sued, shall be repaid or reimbursed to him.

"No such judgment, damages, or costs shall be paid or reimbursed in behalf of a person who has acted negligently or in bad faith, or with wilful oppression."

The same provisions are found in the preceding codes. Act 2657, sec. 1725; Act 2339, sec. 144.

The analogies indicated bring into perfect application the decisions of this Court and of inferior Federal Courts to the effect that the immunity of the government from payment of interest does not prevent such recovery in an action against the collector, and that interest is none the less allowable because the judgment is payable out of the Treasury. *Erskine* v. *Van Arsdale*, 15 Wall., 68; *Patton* v. *Brady*, 184 U. S., 608; *National Home* v. *Parrish*, 229 U. S. 494; *Sage* v. *United States*, 250 U. S., 33; *White* v. *Arthur*, 10 Fed. 80; *McClain* v. *Pennsylvania Co.*, 108 Fed. 618; *Conant* v. *Kinney*, 162 Fed. 581; *State Line* v. *Davis*, 228 Fed. 246; *New York L. I. Co.* v. *Anderson*, 263 Fed. 527.

The principle applies *a fortiori* in the Philippine Islands because section 1583, *supra*, provides for the payment of "judgment, *damages* or costs," and has been construed by the Philippine Supreme Court to cover specifically the award of interest.

> " 'Damages' for the wrongful exaction or withholding of money is the payment of interest at the legal rate (Art. 1108, Civil Code)." *H. E. Heacock Co.* v. *Insular Collector*, 37 Phil. 970, 982.

That this action is against James J. Rafferty personally

under the Civil Code, and not against the Collector of Internal Revenue in his official capacity under the authority of the Administrative Code, appears from the pleadings and from the decisions of the Philippine Courts. The complaint necessarily describes defendant as Collector of Internal Revenue, but neither in the title nor in the allegations is Mr. Rafferty made defendant *as* such Collector; the allegations show that the disputed payments were made to James J. Rafferty, and the prayer is for judgment against James J. Rafferty "with interest;" there is no allegation of the exhaustion of the administrative remedy which is made a condition precedent of the right of action granted in sec. 1579 of Act 2711. (Record, pp. 2-10.) The answer conforms to the complaint, admits its allegations, and fails to assert any defense based upon sec. 1579 or upon the theory that Mr. Rafferty is sued in his official capacity. (Record, p. 12.) The decision of the Court of First Instance recites that the action has been brought "to recover from the defendant, James J. Rafferty," and although no interest was allowed by that court, there is no reference in the decision to sec. 1579 nor reason for the refusal of interest. (Record, pp. 13-17.)

The decision of the Philippine Supreme Court awards interest, and the majority opinion cites as authorities for such award the *Erskine* and *National Home* cases, *supra*, as well as Art. 1108 of the Civil Code and sec. 144 of the Internal Revenue Law of 1914 (Act. 2339), which is identical with sec. 1583, *supra*, (Record, p. 32). The determination, so indicated, that the action is a personal one against the collector, involves only the construction and application of local law, and is, of course, very persuasive. *Villanueva v. Villanueva*, 239 U. S. 293.

The decision of the Court of First Instance was given July 25, 1918, and the decision of the Philippine Supreme

Court January 26, 1920. Wenceslao Trinidad succeeded James J. Rafferty as Collector of Internal Revenue, February 8, 1918. This may be judicially recognized. *Richardson* v. *McChesney*, 218 U. S. 487, 492. If the action had been against Mr. Rafferty in his official capacity, he would, of course, have been substituted as defendant by his official successor; this is recognized by petitioner, who in support of his present reliance upon sec. 1579, and somewhat tardily, urged in connection with his petition for the writ of certiorari that the substitution be made in this Court (Brief in Support of Petitions, pp. 3, 5). That judgment was rendered by the Court of First Instance and by the Philippine Supreme Court against James J. Rafferty after he had ceased to be Collector of Internal Revenue is further proof that he defended in his personal capacity.

Section 1579 of Act 2711 is inapplicable.

Even if this action were held to be brought against the Collector of Internal Revenue in his official capacity, and, therefore, substantially against the Philippine Government, it would be governed by sec. 1721 of Act 2657 rather than by sec. 1579 of Act 2711. The former Act is the Administrative Code of 1916, superseded on October 1, 1917, by Act 2711, the Administrative Code of 1917, and the only difference in the two sections cited is that the later Code adds the phrase "without interest." The judgment under review, in that respect affirming the judgment of the Court of First Instance, denies a recovery of the collections made under authority of the Administrative Code of 1917, and orders the repayment only of those made under authority of the Administrative Code of 1916.

The minority of the Philippine Supreme Court, by Mr. Justice Malcolm, bottom their dissent from the award of

costs upon the theory that the suit is, in effect, against the Philippine Government, but concur in the award of interest, saying: "Judgment should be affirmed, with interest since this action was instituted and accrued before the Administrative Code of 1917 went into effect." (Record, p. 37.) The learned Justice is verbally inaccurate, because the complaint was filed February 7, 1918, but his meaning is clear and correct, that the measure of relief, under his theory of the nature of the action, must be governed by the same Code under which the undue collections were made. The majority opinion cites in support of the award of interest, *inter alia*, the cases of *H. E. Heacock Co.* v. *Insular Collector*, and *Hongkong & Shanghai Banking Corporation* v. *Rafferty*, *infra*, which hold that interest must be allowed under sec. 1721 of Act 2657 and its prototype in earlier laws. Thus the Philippine Supreme Court is unanimous in holding that *if* the action is substantially against the government, it is controlled, as to the allowance of interest, by the Administrative Code of 1916.

In the *Heacock* case, 37 Phil. 982, the action was against the Collector of Customs to recover import duties, and the provisions of the internal-revenue law did not directly apply; it was held, however, on general principles, that interest was recoverable from the government in the absence of express limitation in the waiver of immunity, and the Court pointed out, by way of analogy, that sec. 144 of Act 2339 (identical with sec. 1583 of Act 2711) specifically provided for the payment of interest awarded in suits against internal-revenue officers.

In the *Hongkong Bank* case, 39 Phil. 145, a judgment had been rendered in first instance against the Collector of Internal Revenue for the recovery of sums unduly exacted as internal-revenue taxes. Pending review on appeal, the Administrative Code of 1917 came into force

with the denial of interest of sec. 1579. The Court, reserving the question of the construction of sec. 1579 in other respects, held that it was not intended to operate upon rights accrued, and that plaintiff was entitled to interest under the corresponding section of the earlier laws. In the recent case of *Palanca* v. *City*, XVIII Official Gazette, No. 89, p. 2725, the Philippine Supreme Court cites and follows the Hongkong Bank Case.

It is true that this action was begun after October 1, 1917, when the Administrative Code of 1917 became effective, and that one of the recovered payments was made October 19, 1917 (fourth cause of action); but that payment, like the others, was exacted under the alleged authority of the Administrative Code of 1916, and was computed upon exports of the quarter ending September 30, 1917. Those exports were made, not only under the assurance of sec. 11 of the Autonomy Act, but under the guaranty of the internal-revenue law then in force that undue exactions of internal-revenue officers might be recovered with legal interest. The construction of sec. 1579 of Act 2711 whereby it is applied only to an action concerning taxes collected under the Code of which it is a part, is a fair and reasonable construction, avoids hardships and injustice, and saves a conflict with constitutional limitations. Such construction by concurrence of all the Justices of the Philippine Supreme Court can hardly be questioned.

The award of costs was not error.

The principles governing the award of costs are set out in the Philippine Code of Civil Procedure:

> "Sec. 487. Costs ordinarily follow result of suit. —Costs shall ordinarily be allowed to the prevailing party as a matter of course, but the court shall have

power, for special reasons, to adjudge that either party shall pay the costs of an action, or that the same be divided, as may be equitable."

The Court of First Instance allowed no costs, and failed to mention the "special reasons" for departure from the general rule. The majority opinion of the Philippine Supreme Court points out that it is established practice to impose costs upon an unsuccessful appellant in that Court, and that no good reason appears for an exception in this case. The minority, by Justice Malcolm, urges as "special reasons" that "no costs should be allowed against the Government of the Philippine Islands, in cases in which the Government of the Philippine Islands or a nominal representative of the Government is the unsuccessful party." (Record, p. 36.)

The reasons of the minority fail if this action is not in fact one against the government. The contention in this respect of respondent has been presented in the discussion of the award of interest. But even if the action is considered substantially against the government, it does not follow that costs should be denied to the successful appellee. The government by section 1579 of Act 2711 (and equivalent sections of preceding Codes) has waived its immunity from suit and thereby has submitted to such consequences as arise from the general procedural law and are not expressly excepted in the waiver. Certainly the sovereign's exemption from costs is no more sacred nor better established than the similar exemption from interest; both are justified by the same reasons. It is difficult to understand how the dissenting Justices, applying a law which made no express reservation in either respect, could find a basis for awarding interest and disallowing costs, unless, perhaps, on the theory that the Code of Civil Procedure leaves the incidence of costs to judicial discretion. If such a theory is sound,

then the determination of the majority of the Court is controlling. Of course, if sec. 1579 of Act 2711 were applicable herein it would strengthen the presumption in favor of the allowance of costs, for the Legislature's express denial of interest warrants the inference of intentional omission of a similar denial of liability to costs.

That the indirect interest of the Philippine government arising from its undertaking to pay the judgment herein is not a sufficient reason for an exception to the general rule, appears from the terms of sec. 1583 of Act 2711 (and its prototype in preceding Codes), which specifically authorize the payment of costs awarded in suits against internal-revenue officers. This provision of law must have been overlooked by the minority of the Philippine Supreme Court.

VII

The equities of the case are all with Respondent.

Petitioner, on page 52 of his brief, admonishes that the equities of the case should be inquired into, and adds

> "The respondents in the instant cases added to the price of their merchandise the amount of the percentage taxes which they paid to the government."

In this Petitioner is mistaken. There is not a word in the record to justify it. There couldn't be, because exactly the contrary is the fact. By reference to the chronology pp. VI-IX herein, it will be observed that for a time the merchants' tax was refunded when goods were exported. In other words, exports were exempt; this because it was thought the subject of export and import duties was one exclusively within the jurisdiction of Congress. This exemption was attempted to be removed by Act 2541, December, 1915, effective January 1, 1916. Doubt-

less during that early part of 1916 respondent, like other merchants, did add the tax to the price, but soon thereafter, to wit, August 29, 1916, Congress passed the Autonomy Act, reorganizing the Philippine Government. It was a solemn, comprehensive, enactment, among other things defining the powers of the Philippine Legislature. It is the final expression of Congress establishing government in the Philippines. It was matured by the years of previous experience, and the deliberations of Congress extending over a long period of time. During three years, 1913 to 1916, this Bill was constantly before Congress or a committee thereof. It was the subject of daily discussion in the Philippines, in the press and among the citizens. One of the most carefully matured features of the Bill,—one Congress insisted upon inserting in the most determined manner, was sec. 11, which said:

> "No export duties shall be levied or collected on exports from the Philippine Islands."

This solemn declaration of Congress everybody thought was the last word. Accordingly, Respondent, like other merchants in export business, understood that export taxes would no longer be charged, and they considered this in making prices at foreign ports in competition with the world. In other words, they thought this tax no longer existed, and they did not add it to their prices. To assume that Respondent did not expect Congress to make good its word is grotesque. To assume that, notwithstanding this express prohibition of Congress, a Philippine tax collector could retain such a tax, is equally grotesque. Respondent thought no export tax could or would be upheld, so made no provision for such tax when the goods were sold.

Even if respondent had shifted the burden by covering the percentage taxes in the prices of its exports, no equities

would arise from that fact to aid the petitioner. The "ultimate consumer" is not a party to this action, and we are concerned only with the comparative equities of petitioner and respondent. If petitioner, or the Philippine Government, may plead in excuse of an unlawful spoliation of respondent that the latter has been able to retrieve its losses, then any debtor may urge as a defense that the creditor has made due provision for bad accounts.

It may not be out of place here to observe that business has, during recent years, been subjected to tax burdens almost beyond its strength to bear, this in the normal course of things. But what a remarkable situation is presented by the claim that Congress in 1920 by a retroactive statute imposed a tax burden on the years 1916 and 1917—a tax which Congress had expressly promised business should never have to bear! Tell burdened business in 1920 it must lose property illegally seized for taxes four and three years before! Such a construction is repugnant to every sense of justice. It violates fair play between government and citizen. It destroys private rights, which is tyranny, and divests citizens of that reasonable protection under the law required by modern society.

Surely Congress cannot be presumed to have intended any such thing. Rather attribute to Congress fair and just dealing, and assume, as reason requires, that it ratified only those taxes collected prior to the Autonomy Act.

SUMMARY

Respondent contends that:

1. The taxes in question were export taxes, because levied on the value of goods exported, and, especially, are admitted to be such.
2. They were prohibited by Congress in the Autonomy Act of August 29, 1916, and therefore were illegally collected.

3. The only ratifying statute at all applicable, is that of June 5, 1920, which must be construed to have legalized only the taxes collected before the Autonomy Act, and not those for which Respondent secured judgment. If it be held that Congress intended to legalize the taxes for which Respondent secured judgment, then that act is null and void, in that it attempts to destroy property without compensation and without due process of law.
4. The judgment of the Philippine Supreme Court is conclusive respecting the interpretation of local laws governing costs and interest; and, in any event, the decision of that Court in the matter of costs and interest involved herein, is, in all respects, according to law and precedent, because
   a. The judgment is against an individual and not a government.
   b. The cause of action arose when there was no law forbidding interest.
   c. Respondent must be allowed interest or he will be denied adequate remedy for the injury sustained. Private property will have been taken for an alleged public use without due compensation.

Therefore, it is respectfuly submitted that the judgment of the Philippine Supreme Court herein should be affirmed.

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